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No. 91-42

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA,
Petitioner,

v.

THERESE A. BURKE, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether discrimination on the basis of sex is a personal injury, so that amounts received in settlement of a claim for sex discrimination in violation of Title VII of the Civil Rights Act of 1964 are "damages received . . . on account of personal injuries" and therefore excludable from gross income for tax purposes under Section 104(a)(2) of the Internal Revenue Code.

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BRIEF FOR RESPONDENTS

This case, which began as a Title VII suit to remedy intentional sex-based discrimination, and proceeded to a settlement in which a $5,000,000 monetary award was distributed to the victims, now presents the question of whether these compensatory settlement proceeds are excluded from income tax as "damages received on account of personal injuries." This question involves the straightforward task of applying the clear language of § 104(a)(2) of the Internal Revenue Code. While the broad and conclusory definition of "income" in 26 U.S.C. § 61 applies to all enhancements of wealth, Congress has determined that some income should nonetheless be excluded from what is considered gross income for tax purposes. In deference to those who have suffered injury, Congress has chosen to exclude "the amount of any damages received (whether by suit or agreement . . .) on account of personal injuries or sickness." 26 U.S.C. § 104(a)(2).

The present case concerns whether this exclusion applies to the portion of a monetary recovery in a Title VII employment discrimination case where the statute allows for recovery as "back pay," and which the legislative history of Title VII and prior decisions of this Court indicate is designed to make a discrimination victim whole for the income lost due to wrongful discrimination. See, e.g., *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-19, 421-22 (1975). Thus, despite petitioner's attempt to avoid the language of the exclusion in § 104(a)(2) and instead argue this case as if it involved whether the recovery is an enhancement of wealth and thus within the meaning of "income" in § 61, the resolution of this case turns on whether invidious discrimination is a personal injury for which damages are received. If so, then all amounts recovered to remedy that fundamental wrong to a human being are excluded from taxation under § 104(a)(2).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 104(a)(2) of the Internal Revenue Code states:

> (a) Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc. expenses) for any prior taxable year, gross income does not include—
>
> > (2) the amount of any damages received (whether by suit or agreement and whether as lump sums or periodic payments) an account of personal injuries or sickness;
> >
> > * * * *
>
> Paragraph (2) shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness.

The applicable regulation, 26 C.F.R. § 1.104-1(c) states:

> Section 104(a)(2) excludes from gross income the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness. The term "damages received (whether by suit or agreement)" means an amount received (other than workman's compensation) through prosecution of a legal suit or action based upon tort or tort-type rights, or through a settlement agreement entered into in lieu of such prosecution.

STATEMENT OF THE CASE

There is more to be said about the sex discrimination suit underlying this case than is provided in petitioner's Statement. The second amended complaint in the original *Hutcheson and OPEIU v. Dean, et al.* (TVA), litigation set forth particular allegations entitled, "The Nature of the Discrimination" to support the claim of intentional discrimination (C.A. App. 28-31).[1] TVA bargained collectively with two groups of unions. One was known as the Trades and Labor Council, consisting of approximately 30,000 employees, of which 97% or more were male (C.A. App. 24). The second group was known as the Salary Policy Employee Panel, consisting of approximately 17,000 employees in five constituent unions, of which the Office and Professional Employees International Union, AFL-CIO, CLC (OPEIU) was one. Within the Panel unions were six salaried groups, where only one, known as Schedule SB, was predominantly female (C.A. App. 25-26).

Prior to 1981, TVA conducted wage and salary surveys within a defined regional geographical vicinity as a foundation for bargaining with its two groups of unions (C.A. 28-29). In 1981, for the first time, TVA unilaterally adopted a local area survey with newly selected employers for the female-dominated SB schedule and two other schedules with significantly smaller numbers of employees. At the same time, TVA continued to use the same regional surveys for its predominantly male groups as it had done in the past (C.A. App. 30). "The selection of these particular employers [in the local survey] was designed and calculated to result in a reduced salary

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[1] References to C.A. App. are to the appendix filed in the court of appeals.

schedule for the [female dominated] SB Schedule, and did result in such a reduced salary schedule . . ." said the district court in the *Hutcheson-OPEIU* case (C.A. App. 30).

The complaint alleged that TVA's conduct constituted intentional discrimination that resulted in disparate treatment of female employees (C.A. App. 31). The complaint also asserted a disparate impact claim. In denying TVA's motion for summary judgment, the district court studied the proof adduced through discovery and then held that the "undisputed factual evidence" led it to find that plaintiffs have "established a *prima facie* case of disparate treatment of women in the 1981 salary schedule changes (C.A. App. 66). Thereafter, TVA was ordered to articulate legitimate business reasons for what it had done. TVA then began serious settlement discussions.

Throughout these discussions, there was never a word between the parties about back pay (C.A. App. 87). TVA agreed to pay $4200 directly to plaintiff Hutcheson without deduction of withholding tax and FICA. When payment of money to the OPEIU was discussed, TVA first proposed to pay the entire $5,000,00 directly to the Union for it to distribute as it would determine (C.A. App. 86). OPEIU said it would be administratively impossible to distribute such an amount to the numerous eligible individuals. Accordingly, the OPEIU asked TVA to make the distribution based on a formula selected by the Union. TVA made it a condition of its doing the distribution that it would deduct withholding taxes and FICA contributions. In order to facilitate the process, the OPEIU agreed to this condition (C.A. App. 88).[2]

[2] A later amendment to the settlement agreement provided that TVA would remit to OPEIU what was undeliverable (C.A.App. 76-78). Under this provision, TVA remitted $114,380.51 to OPEIU. At the time of the making of the record in the district court, OPEIU had made direct distribution to five claimants and did not deduct any withholding or FICA from those proceeds (C.A.App. 91).

The money was ultimately distributed to persons who worked in the SB schedule from June, 1981 to March 10, 1987, taking into account length of service and base rates of pay.

But payments directly to Hutcheson and through OPEIU were only a part of the settlement. In addition to dropping its counterclaim against the Union, TVA signed an intention to return future salary surveys to a regional basis, and an intention to provide a form of salary arbitration in any future contract between TVA and the Salary Panel (C.A. App. 72).[3]

Although there was no explicit provision in the settlement agreement about what would happen to post-settlement salaries in the female-dominated SB schedule, there are sufficient facts from which an undisputed conclusion may be drawn as to what did happen to them. The $5,000,000 paid through OPEIU was in "full and final settlement" of the litigation and TVA was forever released from any liability on account of anything related to or arising out of any matters alleged in the complaint (C.A. App. 74). There was no liability after the March 10, 1987 cut-off date. Strikingly absent from the settlement was any agreement by TVA to put into place any new non-discriminatory salary rates.

Respondents argued in the district court and the court of appeals that the $5,000,000 distribution was not back

[3] The dismissal of the counterclaim relieved OPEIU of an enormous potential liability (C.A.App. 86). The agreement on a new provision on future salary arbitration could not have been sought in the complaint and could not have been obtained in a court judgment. This Court has given wide leeway to parties to resolve Title VII disputes with remedies that could not be obtained by judicial order. *International Association of Fire Fighters v. City of Cleveland*, 478 U.S. 501 (1986). Thus, the fact that the statute at that time only allowed back pay in money terms does not mean that the financial part of any Title VII settlement could only be back pay. See, e.g., *Sweet v. General Tire and Rubber Co.*, 28 F.E.P. Cases 804, 813 (N.D.Ohio, 1982), where the court found that the parties' intent in a settlement agreement was that payment was more in the nature of damages than a back pay calculation.

pay. We may proceed here, no matter what the recovery may be called, on basis that the mony was derived from an action claiming violation of Title VII because of discrimination against women.

The court of appeals below did not undertake any particular classification of the proceeds but framed its question in terms of "whether damages received in a settlement agreement in a Title VII action for sex discrimination are excludable as damages for 'personal injury' under Internal Revenue Code Sec. 104(a)(2)." (Pet. App. 4a).

The court below said that the resolution of the question turned on "whether injuries resulting from sex discrimination in violation of Title VII are 'personal' injuries." (Pet. App. 6a.). It further held that the government's argument must be rejected because it "focuses its analysis on the consequences of a Title VII violation (the payment of back pay for lost wages) rather than the personal nature of the injury (invidious discrimination). (Pet. App. 8a). The court of appeals also met the government's argument that recipients who were not taxed would be better off for tax purposes than those who had not been discriminated against: "a plaintiff who suffers the personal injury of discrimination and loses pay as a consequence will be treated identically to the victim of a physical injury whose damage award which includes lost wages is not taxable despite the fact that those wages would have been taxed had the injury not occurred."

The court below concluded that "Courts have long held that injuries resulting from invidious discrimination, be it on the basis of race, sex, national origin or some other unlawful category, are injuries to the individual rights and dignity of the person. (Citing cases)." (Pet App. 6a). Thus, because the proceeds recovered by respondents were received on account of personal injuries, they were excluded from taxation by the terms of Sec. 104(a)(2).

SUMMARY OF ARGUMENT

Section 104(a)(2) of the Internal Revenue Code excludes from income that otherwise would be subject to taxation "any damages" received "on account of personal injuries." Following this plain language, the inquiry in this case is straightforward: is invidious discrimination on the basis of race, sex, national origin, and religion which is made actionable by Title VII of the Civil Rights Act of 1964 a personal injury for which monetary recovery is damages?

The personal nature of the injury is the first relevant inquiry, rather than whether the personal injury results in economic loss consequences or non-pecuniary consequences. The language of the statute and the applicable regulation applies to *all* amounts recovered for personal injury. By their plain terms, these controlling provisions make no distinction between recoveries for economic loss and recoveries for other losses. Nor does the statute make any distinction between the tax treatment of recoveries for physical injuries and non-physical injuries. Consequently, petitioner's argument, which focuses on the theory that a back pay recovery under Title VII is for economic loss measured by the mount of wage loss, is irrelevant to the proper inquiry under § 104(a)(2). Petitioner's assertions are all directed to the consequences of an injury, rather than to whether the injury is to rights secured to the person.

As this Court found in *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the purpose of the Title VII back pay recovery is to make victims whole for the injury of discrimination. Thus, a back pay award fits the well-established meaning of the term "damages." Any contrary assertions focused on whether Title VII relief is equitable or not damages ignore the meaning of what damages represent in our legal system and are wrong.

Petitioner fails to come to terms with the recognized compensatory function of Title VII recoveries when it

insists that such recoveries do not restore lost capital. In this regard, a Title VII back pay award is no different in restorative purpose or measurement by the amount of the victim's loss than the lost income portion of any tort recovery for a physical or a non-physical injury. Thus, petitioner's insistence that a back pay award is deferred wages and would have been taxable if the victim had not been wronged completely ignores § 104(a)(2). All tort victims would have paid taxes on their earnings if their earning capacity had not been diminished on account of a wrongful invasion of their rights.

The right to be free from discrimination on the basis of one's race, sex, national origin, or religion is a fundamental personal right. Wrongful deprivations of that right are fundamentally personal injuries. As this Court held in *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), the mere fact that economic interests are one of the interests, or even the main interest, protected by an anti-discrimination statute does not alter the conclusion that the right to be free from discrimination is personal. Since deprivations of Title VII rights are personal injuries, all monetary recoveries from such injury are damages that are excluded from taxation under § 104(a)(2).

The exclusion of Title VII recoveries furthers the purposes of both Title VII and § 104(a)(2). While recently amending Title VII, Congress confirmed that discrimination is as reprehensible as "assaults, batteries, and other intentional injuries to people." And § 104(a)(2) declares that all taxpayers who have suffered such personal injuries should not have to pay tax on their recoveries. While petitioner claims that this may make injured taxpayers better off for tax purposes than non-injured taxpayers, that is essentially a complaint about the terms of § 104(a)(2), and thus a concern for Congress, not this Court. Moreover, the theory about injury victims being better off is misguided. When the recovery is received in a lump sum, this may push the injured taxpayers into a

higher bracket and they may well pay more in taxes than if they had not had their earning capacity diminished due to an invasion of rights. The injury victim is also deprived of interest and other capital and personal investment opportunities during the period of reduced earnings caused by the wrong. And, the mere receipt of monetary compensation does not make a discrimination victim better off than someone who has never suffered the humiliation and indignity of discrimination, because money cannot wholly cure the full extent of the personal destruction.

ARGUMENT

I. THE PROPER INQUIRY FOR EXCLUSION UNDER SECTION 104(A)(2) IS WHETHER THE UNDERLYING CLAIM SEEKS TO REDRESS "PERSONAL INJURIES."

A. The Statute and Regulations Exclude "Any Damages," Defined as Any "Amounts," Received "On Account of Personal Injuries", And Do Not Distinguish Between Recoveries for Economic Loss and for Nonpecuniary Loss.

As this Court has said on countless occasions, in any case of statutory construction, such as this one, "'the starting point is the language of the statute.'" *Dole v. United Steelworkers of America*, 110 S.Ct. 929, 934 (1990) (quoting *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 5 (1985)). Petitioner, however, avoids confronting the plain language of § 104(a)(2) and the implementing regulation, and offers several different theories about why some, but not all, recoveries for the economic loss occasioned by injuries ought to be taxable income. Virtually all of petitioner's arguments and its historical discussion are focused on a provision of the Internal Revenue Code—§ 61—not involved in this case. Without question, awards in tort and tort-like cases are "enhancements of wealth" that could be taxed under the expansive definition of income in § 61, *absent* the statu-

tory exclusion in § 104(a)(2). Thus, it is irrelevant that the recovery in this case fits the definition of "income" in § 61: this case concerns only whether this compensatory recovery is excluded from what would otherwise be income by operation of the plain language of § 104(a)(2). So, we turn first, as we must, to the language of this statute, which supports the position that respondents' Title VII settlement recoveries are damages "on account of personal injury" under § 104(a)(2) and, therefore, are not subject to federal income tax.

Section 104(a)(2) excludes from taxable income "*any* damages received" on account of personal injuries (emphasis added). This language makes no distinction between the damages intended to restore lost wages and the damages attributable to nonpecuniary harm. Similarly, the implementing regulation, 26 C.F.R. § 1.104-1(c), expansively covers all "amounts" received through prosecution of a tort or tort-type claim. This language, too, makes no distinction between amounts received to compensate for economic loss or amounts intended to compensate for the noneconomic consequences of injuries. See, e.g., *Roemer v. Commissioner*, 716 F.2d 693, 697 (9th Cir. 1983); *Threlkeld v. Commissioner*, 87 T.C. 1294, 1299 (1988), *aff'd*, 848 F.2d 81 (6th Cir. 1988).

Throughout its brief, petitioner attempts to divert attention from the inquiry mandated by the language of § 104(a)(2) by characterizing a Title VII back pay recovery as based on wages, and thus in the nature of deferred salary. This assertion amounts to nothing more than pointing out that a back pay recovery compensates for economic loss caused by discrimination. Petitioner's characterization leads to the proposition that the consequences of the injury ought to determine taxability, rather than whether the underlying claim is for a personal injury. This argument totally fails to come to grips with § 104(a)(2). According to the plain language of the statute, both a monetary recovery for economic loss and one for nonpecuniary harm are fully excludable under § 104(a)(2) when the taxpayer suffers a personal injury. See Rev. Rul. 85-97, 1985-2 C.B. 50 (the entire amount received in settlement of a suit for personal injuries, including the portion allocable to the claim for lost wages, is excludable from income under § 104(a)(2)).

Not only is petitioner's "consequences of the injury" test precluded by the language of § 104(a)(2), but it also would make no sense, in light of the multiple impacts of personal injuries and the restorative purposes of tort-type schemes, to read such a test into the statute. Personal injuries, or wrongs that invade rights accorded to persons under the law, frequently have physical and emotional impacts, and lead to both economic loss, such as lost wages and out-of-pocket costs, and nonpecuniary harm, such as pain, humiliation, emotional distress, loss of self-esteem and human dignity. Since tort law and tort-type rights protect economic interests as well as physical and emotional interests, see Prosser & Keeton on Torts 2-3 (5th ed. 1984), compensation for the income lost on account of an injury to one's personal rights is a standard feature of personal injury tort law and of statutes, such as discrimination statutes, that establish tort-type rights.

The court below followed the language of the statute and thus stated and applied the correct inquiry: "determining whether the § 104(a)(2) exclusion applies requires an examination of the nature of the injury to determine whether the injury and claim are personal and tort-like in nature, and not whether the consequences of the injury resulted in an award of compensatory damages or damages for back pay." 929 F.2d at 1121. The Courts of Appeals and the Tax Court are in complete agreement that the applicability of § 104(a)(2) turns on whether the underlying claim for which a monetary payment was received is tort-like and involves a personal injury, and not on whether the consequences of the injury are economic loss or noneconomic loss. See, e.g.,

Bent v. Commissioner, 835 F.2d 67 (3rd Cir. 1987); *Byrne v. Commissioner*, 883 F.2d 211 (3rd Cir. 1989); *Rickel v. Commissioner*, 900 F.2d 655 (3rd Cir. 1990); *Pistillo v. Commissioner*, 912 F.2d 145 (6th Cir. 1990); *Wulf v. City of Wichita*, 883 F.2d 842 (10th Cir. 1989); *Roemer v. Commissioner*, 716 F.2d 693 (9th Cir. 1983); *Redfield v. INA*, 940 F.2d 542 (9th Cir. 1991); *Thompson v. Commissioner*, 866 F.2d 709, 711 (4th Cir. 1989);[4] *Threlkeld v. Commissioner*, 87 T.C. 1294 (1987), aff'd, 848 F.2d 81 (6th Cir. 1988); *Metzger v. Commissioner*, 88 T.C. 834 (1987), *aff'd mem.*, 845 F.2d 1013 (3rd Cir. 1988); *Downey v. Commissioner*, 97 T.C. 150 (1991).

To examine the nature of the injury we look first to whether the employment discrimination made actionable by Title VII is a "personal injury." If it is, then all monetary relief that flows from the injury is excludable from taxable income, regardless of whether the compensatory monetary recovery is part of an equitable package of remedies, whether it only restores wage loss, or whether it also compensates for other losses.

Quite recently, subsequent to the filing of petitioner's brief, the U.S. Court of Appeals for the D.C. Circuit reached the erroneous conclusion that a Title VII back pay recovery was not encompassed by § 104(a)(2) because a monetary amount awarded pursuant to a court's equitable powers was not "damages." *Sparrow v. Commissioner*, No. 90-1151, 1991 U.S. App. LEXIS 27991 (D.C. Cir. Nov. 26, 1991). Thus, the *Sparrow* court refused even to perform the inquiry mandated by

[4] Although *Thompson* noted the proper inquiry and also concluded that sex discrimination is a personal injury and actions to redress sex discrimination are "tort or tort-type actions," 866 F.2d at 712, the court then in fact applied the improper "consequences of the injury" analysis. When it ruled that the Equal Pay Act back-pay award was a recovery for "earned, but unpaid wages" so that the claim was really more in the nature of a contract claim, it allowed the consequences of the injury to control the conclusion about the nature of the claim.

§ 104(a)(2): whether the monetary compensation was received on account of a personal injury. The D.C. Circuit also erroneously failed to consider the regulation, which makes no distinction based on the form of the action. 26 C.F.R. § 1.104-1(c) defines "damages received" as any "*amounts* received through prosecution of a legal suit or action based upon tort or tort-type rights" (emphasis added). A Title VII back pay recovery is such an "amount" received from an action based upon tort or tort-type rights.

The *Sparrow* conclusion that only the monetary amount awarded by a court "at law" could constitute "damages" rested on a fundamental error. The D.C. Circuit stated that because a court at law could only award damages, then only a monetary award "at law" could constitute damages. Slip op. at 6-7. Yet the court failed to recognize that equity courts could award "damages." Although a party seeking only monetary relief had to bring its suit "at law," in a case properly in equity, the chancellor could dispense compensatory damages when necessary to give complete relief, under what is known as the "clean up" doctrine. Indeed, it was so well-recognized that equity courts could award damages when incidental to the equitable relief sought, that as eminent an authority as Mr. Justice Story devoted an entire chapter in his *Commentaries on Equity Jurisprudence* (vol. 2, 13th ed. 1886) to "Compensation and Damages." See *id.* at § 799a, p. 122. See also 1 Pomeroy, A Treatise on Equity Jurisprudence §§ 236-41 (1881). For example, in cases seeking injunctive relief, it was common for an equity court to award damages for the loss, including for torts, up to the time of the injunction. See, e.g., Walsh, A Treatise on Equity 23, 142, 178-180 (1930); *Medtronic, Inc. v. Intermedics, Inc.*, 725 F.2d 440 (7th Cir. 1984); *Langley v. Colonial Leasing Co.*, 707 F.2d 1 (1st Cir. 1983).

The D.C. Circuit in *Sparrow* also ignored the standard definition of "damages," which makes no distinction based

on the form of the action. 25 C.J.S. Damages § 3; 31 C.J.S. Equity § 72. "In legal parlance, the term 'damages' refers to money awarded as reparation for injury resulting from breach of legal duty. Webster's Third New International Dictionary 571 (1991); Black's Law Dictionary 352-352 (5th ed 1979); D. Dobbs, Law of Remedies, § 3.1, p. 135 (1973); W. Hale, Law of Damages 1 (Cooley 2d ed 1912). Thus, the phrase 'money damages' is something of a redundancy, but it is, nonetheless, a common usage and refers to one of the two broad categories of judicial relief in the common-law system. The other, of course, is denominated 'specific relief.' Whereas damages compensate the plaintiff for a loss, specific relief prevents or undoes the loss—for example, by ordering return to the plaintiff of the precise property that has been wrongfully taken, or by enjoining acts that would damage the plaintiff's person or property. See 5A A. Corbin, Contracts § 1141, p. 113 (1964); Dobbs, supra, at 135." Scalia, J., in *Bowen v. Massachusetts*, 487 U.S. 879, at 913-4 (1988) (dissenting).[5]

The term "damages" in § 104(a)(2) should be given its plain, long-established meaning. *Crane v. Commissioner*, 331 U.S. 1, 6 (1947). The statute does not carve out from the general term recoveries for lost pay, nor does it distinguish between damages recovered in an action "at law" or damages recovered "in equity." Thus, the fact that some courts have referred to the back pay compensation provided by ~~Title~~ VII as "equitable" or restitutionary in

[5] 25 C.J.S. Damages § 1 defines "damages" as "the compensation which the law will award for an injury done; a compensation, recompense, or satisfaction in money for a loss or injury sustained; and the most common meaning of the term is compensation for actual injury." Black's Law Dictionary in its 6th edition, 1990, defines "Damages" as "[a] pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission of another."

nature[6] is irrelevant to the determination of whether it is embraced within the definition of "damages" in § 104(a)(2). A monetary remedy can be discretionary or incidental to equitable relief, and thus labeled "equitable," but still constitute damages. Restitution in the judicial context is a form of money damages when it is measured by the plaintiff's loss, as a Title VII recovery is, rather than by the defendant's gain. D. Dobbs, Remedies 1-2, 222-223 (1973); *Bowen*, 487 U.S. at 917 n. 2 (Scalia, J., dissenting); Laycock, The Scope and Significance of Restitution, 67 Tex. L. Rev. 1277, 1282-83 (1989). It is the monetary form and compensatory purpose of the recovery that results in the label "damages"; and not whether the "damages are characterized as equitable." *Chauffeurs, Teamsters & Helpers, Local 391 v. Terry*, 110 S.Ct. 1339, 1347-48 (1990).

Nor does the fact that the Title VII recovery is based on pay or called "back pay" preclude application of the label "damages". Pay that would have been received in the absence of the wrong is a classic element of damages. C.J.S. Damages §§ 136-37; D. Dobbs, *supra* at 924-27. The monetary compensation designated as "back pay" in a Title VII case is identical in form and substance to the monetary compensation for lost wages awarded in other tort and employment contexts—compensation widely acknowledged to be "damages." Thus, many courts, including this Court, have referred to Title VII back pay awards with the terminology "damages." See, e.g., *General Telephone Co. v. EEOC*, 446 U.S. 318, 326 (1980); *Johnston v. Harris Cty. Flood Control Dist.*, 869 F.2d 1565-1579-1580 (5th Cir. 1989); *Thompson v. Commissioner*, 866 F.2d 709, 711-12 (4th Cir. 1989); *Metzger v. Commis-*

[6] *Sparrow*, slip op. at 8-9; *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969), *Cf. Curtis v. Loether*, 415 U.S. 189, 197 (1974); *Chauffeurs, Teamsters & Helpers, Local 391 v. Terry*, 494 U.S. 558, 110 S.Ct. 1339, 1348-49 (1990) (noting, while carefully avoiding deciding, the characterization by other courts of Title VII back pay as "equitable").

sioner, 88 T.C. 834, 856-58 (1987), *aff'd mem.*, 845 F.2d 1013 (3rd Cir. 1988).

Whether tagged with the label "equitable", as in Title VII, or "legal" as in the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626(b), and 42 U.S.C. § 1981, "back pay" is "pecuniary compensation" which can only be awarded to a "person who has suffered loss, detriment, or injury" from the "unlawful act" of invidious discrimination. Therefore, it squarely fits the standard definition of "damages." Black's Law Dictionary 389 (6th ed. 1990). *Cf. United States v. Testan*, 424 U.S. 392, 404 (1976) (describing remedy of Back Pay Act, 5 U.S.C. § 5596, as "money damages"). *But cf. Hubbard v. EPA*, No. 90-5250, 1991 U.S. App. LEXIS 28168 (D.C. Cir. Dec. 3, 1991) (disregarding cases that find back pay compensatory, holds that back pay not within meaning of "money damages" in 5 U.S.C. § 702 because it is in nature of specific performance).

Like the "back pay" sought in *Local No. 391 v. Terry*, 110 S.Ct. at 1348, a duty of fair representation case, the back pay sought in a Title VII case "is not money wrongfully held by [the employer], but wages and benefits [plaintiffs] would have received" but for the wrongful action. *Id.* at 1348. In discrimination contexts such as 42 U.S.C. § 1981 and the ADEA, this monetary award is understood to be "damages." "We conclude that back pay or lost wage determinations are inherently in the nature of legal damages," *Setser v. Novack Inv. Co.*, 638 F.2d 1137, 1140-41 (8th Cir.), *cert. denied*, 454 U.S. 1064; *Lorillard v. Pons*, 434 U.S. 575 (1978); *Rickel v. Commissioner*, 900 F.2d 655 (3rd Cir. 1990); *Pistillo v. Commissioner*, 912 F.2d 145 (6th Cir. 1990); *Redfield v. INA*, 940 F.2d (9th Cir. 1991) (ADEA cases characterizing back pay as damages). See also *Santiago-Negron v. Castro-Davila*, 865 F.2d 431, 441 (1st Cir. 1989) ("back-pay" for unlawful discharge under 42 U.S.C. § 1983 is "legal damages" because in tort actions lost wages are traditionally treated as being an element of

compensatory damages); *Davis v. Passman*, 442 U.S. 228, 245 (1979) (suit for "damages" for sex discrimination brought by congressional employee under Fifth Amendment; only form of "damages" sought was "back pay"; in noting that relief in "damages" for "back pay" would be judicially manageable Court equates the damages sought by Davis with the back pay awarded under Title VII).

To recover for wages lost due to intentional race-based employment discrimination under § 1981 or under Title VII, a plaintiff would have to submit identical proof: that the employment decision was purposeful and based on race, and that the unlawful act caused actual injury in the form of lost wages, and the wage loss was of a certain amount. See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164, 186-87 (1989) (adopting proof standards from Title VII for § 1981 claim). The exact same monetary remedy, awarded to compensate for the exact same loss—wage deprivation caused by unlawful employment discrimination—should be regarded as "damages" within the meaning of I.R.C. § 104(a)(2) no matter what employment discrimination statute formed the basis for the recovery. *Cf. Helvering v. Clifford*, 309 U.S. 331, 334 (1940); *Helvering v. Hallock*, 309 U.S. 106, 118 (1940) (rejecting proposition that interpretation of tax laws should turn on classification distinctions of legal history).

Yet the reasoning of the D.C. Circuit in *Sparrow* leads to the anomaly that the same form of remedy is "damages" subject to further analysis under § 104(a)(2) if awarded for employment discrimination under a statute such as § 1981 or the ADEA, but is not "damages" for § 104(a)(2) purposes if awarded for the exact same wrong under Title VII. According to the rationale of *Sparrow*, which denominates some, but not all, compensatory monetary recoveries as "damages," victims of race discrimination in employment who can bring their cases

under both § 1981 and Title VII, but can recover only once for their wage loss, would have to give different tax treatment to the single recovery for the same loss depending on which pleading box it is allocated to. Victims of race discrimination who pursue relief solely under § 1981 could avail themselves of § 104(a)(2), whereas victims of the same unlawful conduct who seek redress only under Title VII could not. And victims of sex-based employment discrimination, who must bring federal claims only under Title VII, would not be able to exclude under § 104(a)(2) the amount received for their lost wages, even though the nature of the wrong, the nature of the injury, and the form and purpose of the compensation are identical to the race discrimination action.

Apparently, even petitioner would not agree with this disparate treatment, since in its brief and in the Petition for a Writ of Certiorari the United States acknowledges that there is no valid basis for distinguishing the tax treatment of back pay under Title VII or under other federal employment discrimination statutes. Pet. Br. at 26 n. 20; Pet. at 17. Moreover, this differential tax treatment of race and sex discrimination victims undermines a principal reason Congress enacted the Civil Rights Act of 1991, S. 1745, 102nd Cong., 1st Sess. (1991). Congress intended to achieve greater remedial parity among victims of sex and race discrimination, not to exacerbate disparities. See H.R. Rep. No. 102-40, Part 2, 102nd Cong., 1st Sess. 24-29 (May 17, 1991); H.R. Rep. No. 102-40, Part I, 102nd Cong., 1st Sess. 15 (Apr. 24, 1991); "[T]he harms women and religious and racial minorities may suffer as a consequence of the various forms of intentional employment discrimination are the same. Where the manifestations of prohibited conduct are the same, and the harms caused are the same, the remedies should be the same as well." This parity can be achieved only if crabbed views of "damages," such as those of the D.C. Circuit, are rejected, and in their

place one uses the common meaning of any monetary recovery to remedy a wrongful act.

B. The Compensation for Either Economic Loss or Nonpecuniary Loss that Flows From Non-Physical Personal Injuries is Excludable Under Section 104(a)(2).

As demonstrated, the plain language of § 104(a)(2) and its implementing regulation apply to all amounts received on account of personal injury, whether the injury is physical or non-physical, and whether the personal injury leads to adverse economic or nonpecuniary consequences. Yet petitioner attempts to equate a back pay recovery under Title VII with wages or lost salary, in order to imply that because the injury causes economic consequences, it cannot be a personal injury. But this is merely another way of arguing that the consequences that flow from an injury should determine the excludability issue. See Ennis & Smolarek, Tax Consequences of Court Awards and Settlement Payments Received in Employment Cases, 6 The Labor Lawyer 395, 400 (1990). It is not whether money or salary has been lost or wrongfully withheld that determines whether an injury is personal or nonpersonal. After all, physical injuries, which are universally acknowledged to be "personal" often lead to lost or diminished salary, and the amounts recovered for lost wages on account of physical injury are plainly excluded from taxable gross income under § 104(a)(2). See Rev. Rul. 85-97, 1985-2 C.B. 50. The determination of whether an injury is personal in nature turns on whether there has been a deprivation or invasion of "rights that an individual is granted by virtue of being a person in the sight of the law." *Threlkeld v. Commissioner*, 87 T.C. at 1308. Accord, *Rickel*, 900 F.2d at 659; *Pistillo*, 912 F.2d at 148.

While petitioner apparently agrees that the Service's rejection in Rev. Rul. 85-97 of the "consequences of the injury" inquiry is correct when physical injuries are

involved, petitioner's position apparently is that when the injury to personal rights is non-physical, one should look at the consequences that flow from the injury to determine whether § 104(a)(2) is applicable. Thus, according to this rationale, if the compensation is for salary lost due to a non-physical injury, then the recovery is not subject to § 104(a)(2), whereas if the monetary recovery is for emotional distress or suffering due to the injury to personal rights, then it is excludable. Pet. Br. at 22-23.[7]

The differential treatment of physical and non-physical injuries conflicts with the plain language of the statute. The statute uses the term "personal injuries." For compensatory recoveries, it makes no distinction between physical personal injuries and nonphysical personal injuries. *Roemer v. Commissioner*, 716 F.2d 693, 697 (9th Cir. 1983). As the Service itself stated in Rev. Rul. 85-98, 1985-2 C.B. 51, "the regulation makes no distinction between physical or emotional injuries" (citing *Seay v. Commissioner*, 58 T.C. 32, 40 (1972), acq., 1972-2 C.B. 3). See also *Miller v. Commissioner*, 93 T.C. 330, 337 (1989) ("Section 104 does not distinguish between physical and nonphysical injuries, and we see no sound reason to construe the statute in such a way as to not afford

[7] While petitioner's brief is somewhat obfuscatory on this point, perhaps deliberately so given the consistency with which courts have rejected the argument, the brief constantly stresses that it is dealing with the inquiry applicable to recoveries involving "non-physical" injuries. *Cf.* Pet. Br. at 21 n.16, where the United States attempts to dismiss Rev. Ruling 85-97 as inapplicable because it dealt with physical injuries. Nothing in the text of that Ruling, however, limits its holding that a recovery to compensate for wage loss is excluded under § 104(a)(2) to physical injuries.

It would not be necessary throughout the brief to stress the non-physical nature of the injury if petitioner's position was that all recoveries compensating for economic loss or nonpecuniary loss for all personal injuries, whether physical or non-physical, were treated the same and thus fully excludable under § 104(a)(2).

the same tax treatment to recoveries for all types of 'personal' injury regardless of consequences.").

The statute draws a distinction between physical and nonphysical injuries only for punitive damages—which back pay under Title VII plainly is not. As a result of an amendment to § 104(a)(2) passed as part of the 1989 Omnibus Budget Reconciliation Act, 103 Stat. 2379 (1989), the statute now provides that the exclusion "does not apply to punitive damages in cases not involving physical injury or sickness." Congress obviously knew how to make the distinction between physical and non-physical injuries. The fact that it chose not to make such a distinction for compensatory recoveries indicates an intent that there should be no such differential treatment.

The legislative history of the 1989 amendment supports this conclusion. The original bill introduced in the House of Representatives would have limited the § 104(a)(2) exclusion for all monetary recoveries to cases involving physical injury or sickness.[8] The Senate bill had no such limitation, and in conference the § 104(a)(2) exemption was circumscribed only for punitive damages in cases involving non-physical injuries. Thus, when analyzing the taxability of compensatory recoveries such as awards for lost wages, it continues to make no difference whether the invasion of personal rights resulted in physical or nonphysical injury.

The Conference Report also acknowledged that "under present law, damages received on account of personal injury are excludable from gross income. In some cases, courts have held that this exclusion is available even though there is no physical injury, for example, in cases involving employment discrimination." H.R. Conf. Rep.

[8] The House Report specifically mentioned that "some courts have held that the exclusion applies to damages in cases involving employment discrimination." H.R. Rep. No. 247, 101st Cong., 1st Sess. 1354-55, *reprinted in* 1990 U.S. Code Cong. & Admin. News 2824-25.

No. 386, 101st Cong., 1st Sess. 622-23, *reprinted in* 1990 U.S. Code Cong. & Admin. News, 3225-26.

The fact that the Conference Report took note of the cases excluding back pay awards in employment discrimination cases and made no statutory change that would overturn these cases indicates that Congress endorsed the judicial conclusion that there should be no distinction between the compensatory recovery in physical injury cases and nonphysical injury cases, and that employment discrimination awards were excludable. See *Rickel v. Commissioner*, 900 F.2d at 664 (citing *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (Congress presumed to be aware of interpretation of a statute and to adopt that interpretation when it re-enacts statute without change). See also, *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 378-79 n.61 (1982) (Congress' perception of the law, whether or not that understanding is "in some ultimate sense incorrect," is what determines legislative intent).

Petitioner's argument that the tax treatment of economic loss recoveries should be different depending on whether the injury to personal rights is physical or nonphysical has been repeatedly and consistently rejected. See, e.g., *Rickel v. Commissioner*, 900 F.2d 655, 658-59 (3rd Cir. 1990) (discussing numerous cases, and concluding that the back-pay recovery for age discrimination must be excluded under §104(a)(2) just as lost wages recovery would be excluded in a physical injury case). In *Threlkeld v. Commissioner*, 87 T.C. 1294, 1301 (1987), the Tax Court called the inconsistent treatment of physical and nonphysical injuries "analytically irreconcilable." It concluded that the approach for physical injuries, where "the entire award is excluded from income even if all or a part of the recovery is determined with reference to the income lost because of the injury," *id.* at 1300, must be followed for nonphysical injuries as well. The Sixth Circuit affirmed, adopting the reasoning of the

Ninth Circuit in *Roemer v. Commissioner*, 716 F.2d 693, 699 (9th Cir. 1983), that for both physical and nonphysical injuries, "the nonpersonal consequences of a personal injury, such as a loss of future income, are often the most persuasive means of proving the extent of the injury that was suffered, and that the personal nature of an injury should not be defined by its effect." *Threlkeld v. Commissioner*, 848 F.2d 81, 83 (6th Cir. 1988).

In two employment discrimination cases, the Third Circuit held that it is improper to analyze non-physical injuries according to their consequences, thus, explicitly rejecting the same argument now advanced by petitioner, "To the extent that the Commissioner argues that because the settlement was intended to compensate [plaintiff] for economic losses it is therefore compensating her for nonpersonal injuries," the argument should be rejected because the existence of economic loss does not make an otherwise personal injury suddenly nonpersonal. *Byrne v. Commissioner*, 883 F.2d 211, 214 (3rd Cir. 1989); *Bent v. Commissioner*, 835 F.2d 67, 69-70 (3rd Cir. 1987).

The decision below rested solidly on the statutory language, legislative history, and ample judicial precedent when it rejected petitioner's argument that monetary recoveries for non-physical invasions of personal rights must be split, for taxation purposes, into their economic loss components and their nonpecuniary loss components. The monetary recoveries in physical injury cases are not similarly parsed, and thus the approach now urged by the government must be rejected. The fact that a non-physical personal injury, such as an invasion of the personal right to be free from invidious discrimination, may result wholly or in part in economic loss, does not make it a nonpersonal injury. *Rickel*, 900 F.2d at 663.

C. The Fact that Compensation for Economic Loss, Such as Back Pay, is Determined Based on Salary, Does Not Turn it into Compensation for Services Rendered Rather than a Monetary Recovery for Loss on Account of Personal Injury.

Throughout its brief, petitioner refers to the back pay remedy in Title VII as "salary" or "deferred salary" or "earned but unpaid wages" and thus akin to "compensation for services rendered." As we have shown, each of these formulations confuse the fact that economic consequences may flow from a personal injury with the proper determination of whether the injury is to rights secured to the person. *Cf. Davis v. Passman*, 442 U.S. 228 (1979) (existence of and nature of right is prior and separate question from the remedy for violations of right). that would apply only if the recovery is not, in fact, received on account of personal injuries. Thus, they completely beg the question that must be asked under § 104 (a) (2).

Just because the amount of wages lost due to discrimination is a means of measuring the extent of the injury, it is not accurate to characterize the recovery as "for" deferred wages. *Bent v. Commissioner*, 835 F.2d at 70; *Roemer v. Commissioner*, 716 F.2d at 699. There is no relevant analytical difference between the recovery for lost wages in a Title VII or other employment discrimination case, and such recovery in any other tort or tort-like case. In each instance the recoveries are intended to compensate for the economic loss caused by the injury. To insist in either context that because the recovery represents lost, or deferred wages, that it should be taxable completely ignores the language of § 104 (a) (2), which asks "on account of what" were the wages lost.

Petitioner's argument that if the plaintiffs had not been wrongfully deprived of compensation they would have paid taxes on what they would have earned, Pet. Br. at 27, also completely evades the language and intent of

§ 104 (a) (2). All tort victims who suffer lost earnings as a result of their injuries would have been taxed if they had not been wronged and had been able to earn the money all along. See *Rickel v. Commissioner*, 900 F.2d at 658, citing L. Frolik, Federal Tax Aspects of Injury, Damage, and Loss 9 (1987). As the Tax Court noted in *Downey v. Commissioner*, 97 T.C. 150, 177 (1991), "[w]hether the damages paid to the tort victim reflect a substitute for amounts or items otherwise taxable or a substitute for amounts or items to be enjoyed without a tax consequence is irrelevant." These considerations are irrelevant because § 104 (a) (2) requires the exclusion of all amounts received on account of personal injury, regardless of whether some of the amount is for lost wages. If petitioner is concerned that § 104 (a) (2) appears to benefit injured taxpayers over non-injured wage earners—a concern we do not share—its remedy is with Congress, not this Court.

It is also irrelevant to the inquiry under § 104 (a) (2) that, as petitioner asserts, the monetary recovery for economic loss in a Title VII case represents an accession to, or enhancement of wealth. This argument is directed at a question not presented here: does money received as a result of a lawsuit fit the definition of income in § 61 of the Internal Revenue Code, so that it could be taxed (unless exempted from tax by another provision of the Code)? The question here is not whether Title VII recoveries are an enhancement of wealth that *could* be taxed under § 61; the question is whether they are excluded from gross income that otherwise would be subject to tax, by virtue of § 104 (a) (2).

Indeed, throughout its brief, petitioner conflates the inquiry under § 61 with the proper inquiry under the exclusion of § 104 (a) (2). When petitioner asserts that the taxability of recoveries for injuries to personal rights turns on whether the recovery represents a make-whole compensation or a gain or profit, e.g. Pet. Br. at 13-14,

the government is in fact addressing the outmoded inquiry for "income" established by *Eisner v. Macomber*, 252 U.S. 189 (1920). Between the *Eisner* decision in 1920 and the decision in *Commissioner v. Glenshaw Glass*, 348 U.S. 426 (1955), it was thought that merely restorative make-whole recoveries, such as tort compensation, were outside the definition of "income" because they were not "gain" or "profit." Since *Glenshaw Glass*, however, it is now widely recognized that restorative recoveries are "gain" or "income" for tax purposes, although they are not "gain" for tort purposes because they restore lost capital. Thus, absent the exclusion of § 104(a)(2), all personal injury recoveries could be taxed. See *Roemer v. Commissioner*, *supra*, n.2; *Raytheon Production Corp. v. Commissioner*, 144 F.2d 110 (1st Cir. 1944) (damages award for anti-trust violation is "income" because "income" for tax purposes includes compensation for loss, absent a specific exclusion); recovery can be return of lost capital and still constitute taxable gain.

Virtually all the regulatory interpretations cited by petitioner consequently are irrelevant to the issue to be decided here, because they are simply interpretations of the scope of I.R.C. § 61. They do not mention, discuss, analyze, or interpret the § 104(a)(2) exclusion. See, Rev. Rul. 55-203, 1955-1 C.B. 114; Rev. Rul. 57-55, 1957-1 C.B. 304, Rev. Rul. 72-268, 1972-1 C.B. 313; Rev. Rul. 72-341, 1972-2 C.B. 32; Rev. Rul. 75-64, 1975-1 C.B. 16.[9]

[9] Some of these Revenue Rulings also deal with the definition of "wages" in I.R.C. § 3121(a). They conclude that if something received from an employer is income not otherwise excludable, then it is also "wages." None of them determine that if one receives "damages on account of personal injury" within the meaning of § 104(a)(2), then such a recovery is also "wages." It is our position, and the position of the court below, that if a payment is received "on account of" having suffered an invasion of personal rights, it is not received merely for having performed services. Thus, an amount excluded from "income" also cannot be "wages"

To the extent that these Revenue Rulings could be interpreted as perhaps implicitly dealing with questions of exclusion under § 104(a)(2) when they discuss the definition of "income" in § 61, then their analysis is fatally flawed for ignoring the statute and focusing only on the remedial consequences—replacement of lost wages—and utterly failing to consider whether the loss occurred on account of personal injury. Moreover, Revenue Rulings do not have the force of law, since they merely represent the opinion of an agency lawyer. *Dixon v. U.S.*, 381 U.S. 68 (1965); *Foil v. Commissioner*, 920 F.2d 1196, 1201 (5th Cir. 1990); *Stubbs, Overbeck & Assoc., Inc. v. United States*, 445 F.2d 1142, 1146-47 (5th Cir. 1971); *Virginia Materials Corp. v. Commissioner*, 67 T.C. 372, 377 (1976).

The only Revenue Rulings cited by petitioner that specifically deal with § 104(a)(2) actually undermine its argument and instead support the position taken by the

within the definition of § 3121(a), and thus is not subject to FICA withholdings. "Wages" is a narrower concept than "income." *Rowan Cos., Inc. v. United States*, 452 U.S. 247, 254 (1981). Moreover, because § 3121 requires that the performance of work must be the reason for the payment, the recovery here is excluded from FICA taxes because personal injury is the reason for the recovery in a Title VII case. *Redfield v. INA*, 940 F.2d at 548 (9th Cir. 1991).

Social Security Board v. Nierotko, 327 U.S. 358 (1946), is not to the contrary. The question in *Nierotko* was whether a back pay award for an unfair labor practice discharge under the NLRA would count as "wages" in order to qualify for benefit purposes under the Old Age Survivor's Insurance provisions of the Social Security Act. The Court's conclusion that the back pay did qualify as wages was heavily dependent upon the definitions and structure of the NLRA. By defining discharged workers as still "employees," the NLRA evinced an intent that people in Nierotko's position should continue to receive all benefits of employment. In no way can *Nierotko* be regarded as an interpretation of § 104 (a)(2) or of Title VII, the two statutes involved in the present case. It is the policy of § 104 (a)(2) that awards to compensate for injury are not subject to any taxation.

court of appeals below. Rev. Rul. 85-97, 1985-2 C.B. 50, rules that all recoveries flowing from personal injury are excludable, including the recovery for lost wages. It also rules that just because such a recovery might be designated "wages" for purposes of some other employment taxes, that designation has no bearing on the § 104 (a)(2) exclusion. Rev. Rul. 85-98, 1985-2 C.B. 51, while primarily about punitive damages, an issue not involved here, does note that there is no distinction between the tax treatment of the compensatory recoveries flowing from physical injuries and such recoveries flowing from nonphysical injuries.

Moreover, it is utterly circular to state that because the underlying Title VII case was about wage deficiencies, the settlement recovery was thus back pay paid "on account of" unpaid wages. This reasoning reduces Title VII to a mere back pay statute, rather than the substantive command against the evil of discrimination that it is. The monetary relief obtained here through the settlement was paid "on account of" a claim that there has been a violation of legal rights protected by Title VII. The underlying Title VII case here was not simply a claim for "wages" or "withheld salary"—it was a claim to redress the wrong of employment discrimination. To say that the case was simply about "wage deficiencies" ignores and trivializes the fact that the cause of action was under Title VII, seeking redress for discrimination. It was discrimination that caused the wage deficiencies. The settlement amount represented a recovery for discrimination, not merely a payment of wages.[10]

[10] Indeed, it can strongly be argued, as respondents did in both the district court and the court of appeals, that the settlement recovery in *Hutcheson and OPEIU v. Dean* was not back pay at all. In as much as the characterization of the settlement proceeds may be ascertained from the intent of the parties, the parties never discussed a back pay calculation and never otherwise talked about back pay. TVA paid $4200 directly to Hutcheson without any effort to calculate a back pay amount and without any deduction for withholding or FICA. TVA first offered to pay to the union the gross lump sum of $5,000,000 to be distributed at the union's discretion (Pet. App. 3a). Moreover, the pay that the workers received was not affected by the settlement. It remained the same so long as the existing contract was in effect. These critical factors show that TVA did not consider the money as back pay, and neither did the union. Since the intent of the settlement was that the payment was a general part of a package of remedies for an allegation of discrimination, rather than a wage adjustment, it is especially true in this specific case that it was improper to withhold FICA or to treat the money simply as deferred or adjusted pay for income tax purposes.

Another illogic that permeates petitioner's circular insistence that the recovery was compensation for services performed is that this rationale would have the taxability of a Title VII recovery turn on the form which the discrimination took in any particular case, rather than on whether discrimination is a personal injury with many manifestations. While it might seem superficially accurate to say that a wage discrimination victim who still worked for her employer at the time the suit was resolved is receiving additional compensation for services rendered, this completely overlooks the fact that it was not the performance of services and the failure to pay for them that led to the recovery. It was the injury of discrimination that led to the compensatory recovery. So it is not analytically sound to say that the injured employee was getting "wages," defined as compensation for services rendered.

Nor can a Title VII recovery be characterized as "compensation for services rendered" when, because of discrimination, someone fails to receive a job or promotion, or is discharged, or is so severely harassed that she miss some time at work or be constructively discharged. Invidious discrimination unfortunately manifests itself in many forms, and in each situation it can cause economic loss as well as personal degradation and humiliation. The taxability of Title VII recoveries for the economic loss

should not turn on whether the victim kept on working for the employer throughout the period of discrimination. Nor should it turn on whether the discrimination adversely affected someone's ability to get a job or a better job, to keep a job, or to earn a fair rate of pay in a job.[11]

The various labels petitioner attempts to put on the monetary recovery under Title VII all disregard the crucial analytical fact under § 104(a)(2): the recovery is awarded when the job was lost or not received, or a fair rate of pay was not earned, "on account of," or because, the person was a victim of invidious discrimination. But for the wrongful act of discrimination, the plaintiff would not have suffered an economic loss. The language and structure of § 104(a)(2) require that this Court, to determine whether the recovery is excluded from taxation, must answer the following question: Is invidious discrimination that adversely affects employment opportunities a personal injury? When it called this question the beginning and end of the matter, the court of appeals below properly ascertained the relevant inquiry under § 104(a)(2). And, as we will now demonstrate, the court below reached the proper answer to this determinative question.

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[11] Indeed, petitioner admits that there should be no distinction made among the various forms of discrimination. Pet. Br. at 26 n.20. Despite this admission, petitioner attempts to distinguish the numerous cases contrary to its position as involving discriminatory discharge rather than salary discrimination. Petitioner then recants the emphasis in text on "services performed," and shifts to calling the discrimination recoveries "compensation" that "should have been paid but was not." *Id.* Each of these formulations is equally flawed for focusing solely on the consequences that flow from the injury—money that was not earned—rather than on the determinative question: "on account of what" was the money not earned?

II. TITLE VII INVOLVES A TORT-TYPE RIGHT TO BE FREE FROM INVIDIOUS DISCRIMINATION, AND SUCH DISCRIMINATION IS A PERSONAL INJURY THAT CUTS TO THE HEART OF ONE'S STATUS AS AN EQUAL HUMAN BEING.

A. Claims Under Title VII to Redress Employment Discrimination are Tort-Like Claims Within the Meaning of 26 C.F.R. § 1.104-1(c).

Since the regulation implementing § 104(a)(2), 26 C.F.R. § 1.104-1(c), indicates that the exclusion does not apply to amounts received through prosecution of claims to enforce contracts, but only to tort or "tort-type" claims, *Downey v. Commissioner*, 97 T.C. 150 (1991), it is necessary to analyze whether Title VII claims fit the definition of "tort-type" claims. In *Downey*, the Tax Court adopted the definition of "tort" in Black's Law Dictionary and the definition of "injury" in the Restatement, 2d of Torts to interpret the term: "The term tort has been defined as '[a] legal wrong committed upon the person or property independent of contract' or 'a violation of some duty owing to plaintiff, . . . generally . . . [arising] by operation of law and not by mere agreement of the parties.' Black's Law Dictionary 1489 (6th ed. 1990). See Restatement, Torts 2d, secs. 4 (defining 'duty'), 7(1) (defining 'injury' as 'the invasion of any legally protected interest of another') (1965). The duty, the violation of which gives rise to a tort claim, can arise by statute." 97 T.C. at —; 1991 U.S. Tax Ct. LEXIS 69 at 10.

Title VII squarely fits these standard definitions. Because of our national moral and legal commitment to according human beings equal treatment and equal employment opportunities, Title VII creates a duty that arises by operation of law, independent of contract, to refrain from making employment decisions on the basis of race, sex, national origin, and religion. See *Rickel v. Commissioner*, 900 F.2d at 662; *Pistillo v. Commissioner*,

912 F.2d at 150; *Redfield v. INA*, 940 F.2d at 546; *Downey v. Commissioner*, 97 T.C. 150 (1991) (using same reasoning to find that claims under the ADEA are tort-type claims for personal injury). A breach of the duty established by Title VII gives rise to monetary liability to compensate for the economic loss caused by the injury and for injunctive and other equitable relief. *Cf. Curtis v. Loether*, 415 U.S. 188, 195 (1974) (fair housing provision of Title VIII of the Civil Rights Act "sounds basically in tort—the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach"). Petitioner's effort to distinguish *Curtis* on the ground that Title VII provides for different relief than Title VIII is unavailing, because the statutes both establish similar tort-like duties.

This Court has previously used the standards and terminology of tort law to interpret Title VII. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Court relied on the but-for causation standards of tort law to determine the standard for liability. Concurring, Justice O'Connor specifically noted the parallels between Title VII and tort law:

> Like the common law of torts, the statutory employment "tort" created by Title VII has two basic purposes. The first is to deter conduct which has been identified as contrary to public policy and harmful to society as a whole. . . . The second goal of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." (citing *Albemarle Paper Co. v. Moody*, 422 U.S. at 418)

490 U.S. at 265 (O'Connor, J., concurring). See also *U.S. Postal Service v. Aikens*, 460 U.S. 711, 716-17 (1983) (interprets intent requirement in Title VII with reference to tort of misrepresentation); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (looks to common law

agency principles to interpret respondeat superior liability under Title VII).

Claims under Title VII cannot be characterized as contract claims. Rights and remedies provided by a contract are not the source of such claims; the statutory duty not to discriminate and the personal statutory right to be free from such discrimination are what form the basis for claims. In the underlying Title VII case here, the reason the lowering of pay schedules for women was wrongful was not because it conflicted with the contract, but because the rate of pay was calculated based on impermissible considerations of the sex of the worker. The case was brought and settled because plaintiffs asserted that the method of adopting the contract itself violated rights secured to them by Title VII as equal human beings in the eyes of the law.

Petitioner states that the claim is in the nature of a contract claim because the rate of pay an employee might have been contractually entitled to often forms the basis for calculating damages for economic loss under Title VII. While often true, this remedial fact hardly converts a Title VII action into a contract claim. After all, in every tort case where the personal injury results in lost time from work or diminution of the injured person's wage-earning capacity, a contract rate of pay forms the basis for calculating the lost income damages.[12] Under

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[12] In any event, the contractual rate of pay would not have formed the basis for calculating back pay damages in the underlying case here if it had gone to judgment rather than being settled. The plaintiffs were contending that the salary schedules underlying their wage rates were intentionally infected with improper consideration of sex. They were not claiming that they should have been paid the rates contained in some other contract, such as those for workers on other salary schedules. A back pay award in the case could not have been calculated with reference to any contract then in existence. It would have been necessary to attempt to calculate what the salaries might have been in the SB schedules if the contract rate had not been infected with sex dis-

petitioner's rationale, part of every tort claim (or at least tort claims for non-physical injuries) would thus be converted into a contract claim. This attempt to have the kind of loss for which compensation is received dictate the nature of the underlying claim is analytically flawed.

The recent amendments to Title VII in the Civil Rights Act of 1991, S. 1745, 102nd Cong., 1st Sess. further support the conclusion that claims under this statute are tort-like in nature. In cases alleging intentional discrimination, such as the underlying case here, compensatory damages for nonpecuniary harm and punitive damages may now be awarded, and a jury trial is available. Congress expanded the available monetary remedies to better redress the full personal ramifications of the injury caused by discrimination. See H.R. Rep. No. 102-40, Part I at 14-15, 64-65. This amendment now makes the remedies available under Title VII more parallel to those available for race discrimination in employment under 42 U.S.C. § 1981, a claim that, even with its specific protection of the right to contract, is clearly a tort-like claim for personal injury. *Goodman v. Lukens Steel*, 482 U.S. 656 (1987). The extension of monetary remedies to cover more than economic loss does not alter the nature of the underlying claim or injury—it simply adds to the remedies. The fact that Title VII has now been made even more like § 1981 further underscores what has always been the essential similarity of the nature of the two claims—they are tort-like in nature because they create a personal right to be free from invidious discrimination, and they allow victims to seek redress when breaches of the statutory duty cause injury.

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crimination. No such calculation was ever done, and no such calculation formed any part of the settlement. Nor did the settlement result in the contract being changed. No contract formed any part of the remedy in this case.

B. Because Title VII Secures Fundamental Personal Rights, Injuries to those Rights Are Inherently Personal Injuries.

If a wrongful action invades rights "that an individual is granted by virtue of being a person in the sight of the law," that action causes a personal injury. *Threlkeld v. Commissioner*, 87 T.C. at 1308. This means that a right is personal if it inheres in one's status as a human being —such as the right to bodily and emotional security, to privacy, to one's good name, to think and associate freely, and to be treated as an equal without regard to one's sex, race, national origin, religion, or age. Under this formulation, wrongful deprivations of civil rights are classic examples of personal injuries. *Wilson v. Garcia*, 471 U.S. 261 (1985); *Bent v. Commissioner*, 836 F.2d 67 (3rd Cir. 1987); *Wulf v. City of Wichita*, 883 F.2d 842 (10th Cir. 1989).

The right to be free from gender discrimination involved in the present case is well-established as a "personal right." *Davis v. Passman*, 442 U.S. 228, 235 & n.10 (1979). As every court that has faced the question has recognized, discrimination on the basis of race, sex, age, or other personal characteristics is fundamentally a personal injury. *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987); *Runyon v. McCrary*, 427 U.S. 160 (1976); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Burke v. United States*, 929 F.2d at 1121-22; *Redfield v. INA*, 940 F.2d 542 (9th Cir. 1991); *Pistillo v. Commissioner*, 912 F.2d 145 (6th Cir. 1990); *Rickel v. Commissioner*, 900 F.2d 655 (3rd Cir. 1990); *Thompson v. Commissioner*, 866 F.2d 709 (4th Cir. 1989); *Downey v. Commissioner*, 97 T.C. 150 (1991); *Metzger v. Commissioner*, 88 T.C. 834 (1987), *aff'd mem.* 845 F.2d 1013 (3rd Cir. 1988).

Seeking to sidestep this wealth of precedent which has found invasions of the right to be free from discrimina-

tion, including discrimination in employment opportunities, to be personal injuries, petitioner argues that no personal injury was involved here because the injury for which plaintiffs sought compensation was an injury to their economic interests. Pet. Br. at 24. Petitioner's argument overlooks the obvious fact that an injury to personal rights can cause adverse economic consequences and still be a personal injury. *Rickel v. Commissioner*, 900 F.2d at 663 ("The nonpersonal consequences of the discrimination, e.g., the loss of wages, does not transform discrimination into a nonpersonal injury.").

An argument virtually identical to the one now advanced by petitioner was emphatically rejected in *Goodman v. Lukens Steel*, 482 U.S. 656 (1987). In that case, the plaintiff sought to equate the § 1981 right to be free from discrimination in contract rights with claims in the nature of contract for statute of limitation purposes. This Court found that the claim was one for personal injuries, and thus the personal injury statute of limitations controlled. The language used to explain the holding is directly applicable here:

> Insofar as [§ 1981] deals with contracts, it declares the personal right to make and enforce contracts, a right . . . that may not be interfered with on racial grounds. The provision asserts, in effect, that competence and capacity to contract shall not depend upon race. It is thus part of a federal law barring racial discrimination, which, as the Court of Appeals said, is a fundamental injury to the individual rights of a person. . . . That § 1981 has far-reaching economic consequences does not change this conclusion, since such impact flows from guaranteeing the personal right to engage in economically significant activity free from racially discriminatory interference.

482 U.S. at 661-62.

Insofar as Title VII deals with the formation, terms and conditions, and termination of employment contracts,

it declares the personal right to have one's employment opportunities free from interference on grounds of one's race, sex, national origin, or religion. The discrimination against the person that the statute prohibits is a fundamental injury to the rights of the person. That Title VII has far-reaching personal and societal economic consequences does not change this conclusion, since such economic impact flows from guaranteeing the personal right to pursue employment opportunities free from the interference of invidious personal discrimination.

Petitioner seeks to dismiss *Goodman* too lightly, when it says that the "decision sheds no light on the proper interpretation of Section 104(a)(2) of the Internal Revenue Code." Pet. Br. at 29. While it is true that *Goodman* was not a tax case, it in fact sheds bright and revealing light on the proper inquiry under § 104(a)(2). The determinative issue under § 104(a)(2) is whether a claim for invidious personal discrimination that affects economic rights is a personal injury. That was the precise question posed in *Goodman*, and this Court concluded that such a claim is indeed one for personal injury.

Petitioner's narrow focus on the economic consequences of discrimination is also flawed because it fails to take into account the panoply of ways in which discrimination adversely affects the person. Although until the recent enactment of the Civil Rights Act of 1991 Congress allowed discrimination victims only compensation for their economic loss, the other personal indignities caused by discrimination, which can now also be compensated, have always existed. As Chief Justice Rehnquist observed, writing for the Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), discrimination "may destroy completely the emotional and psychological stability of minority group workers." Thus, the Court ruled, Title VII's concerns were not limited to instances where there was "tangible loss of an economic character," but also extended to the psychological aspects of the workplace environment and

the entire spectrum of the adverse effects of disparate treatment of women and men. *Id.* at 64.

In the House Report accompanying the Civil Rights Act of 1991, Congress emphatically highlighted the grievous personal injuries that flow from discrimination. "The Committee intends to confirm that the principle of anti-discrimination is as important as the principle that prohibits assaults, batteries, and other intentional injuries to people." H.R. Rep. No. 102-04, Part I, 102nd Cong., 1st Sess. at 15 (1991). The Report went on to elaborate why the personal injury of discrimination is as significant as the other forms of intentional personal injury, including the personal injuries remedied under § 1981:

> [T]he harms women and religious and racial minorities suffer as a consequence of the various types of intentional discrimination are the same: humiliation; loss of dignity; psychological (and sometimes physical) injury; resulting medical expenses; damage to the victim's professional reputation and career; loss of all forms of compensation and other consequential injuries. . . . Gender and religious discrimination are as reprehensible as race discrimination, and should be treated the same for purposes of making victims whole. . . .

Id. at 65. The Report went on to feature testimony by and about employment discrimination victims, describing how the injury they experienced was far more than economic, but also included an overwhelming amount of stress, humiliation, loss of dignity, loss of emotional tranquility, and disruption of personal and family life. These effects ranged across cases involving harassment, termination, salary discrimination, and other disruptions of the terms and conditions of employment. *Id.* Part I at 66-68; Part II at 24-28.

This legislative history underlying the recent amendments to Title VII serves as a powerful reminder of the personal devastation and degradation to human dignity that occurs when an employer discriminates against employees or potential employees on the basis of their most personal attributes—their race, their sex, their age, their ethnicity, their religious beliefs. Thus, all the precedents of this Court, and other courts, that characterize such discrimination as a fundamental personal injury are fully applicable to the interpretation of § 104(a)(2).

C. Excluding Title VII Monetary Recoveries for the Economic Loss Caused by Discrimination from Gross Income for Tax Purposes Furthers both the Purposes of Title VII and § 104(a)(2).

For essentially humanitarian policy reasons, the purpose of § 104(a)(2) is that those who have suffered a personal injury should not be further burdened with taxes. Note, Taxation of Damage Recoveries from Litigation, 40 Cornell L. Q. 345, 346 (1955); Hartnett, Torts and Taxes, 27 N.Y.U. L. Rev. 614, 627 (1952). Courts have expressed this rationale in compensatory terms: "damages paid for personal injuries are excluded from gross income because they make the taxpayer whole for a previous loss of personal rights—because, in fact, they restore a loss of capital." *Starrels v. Commissioner*, 304 F.2d 574, 576 (9th Cir. 1962) (citing *Glenshaw Glass*, where Court observed in a footnote that "personal injury damages are by definition compensatory only," 348 U.S. at 432 n.8).[13] Thus, by definition, if an amount is

[13] It is unclear what, if anything, the *Starrels* court meant to add with the phrase referring to restorations of lost capital. At that time, the economic theory of human capital was not well developed, so the court was probably not referring to the human body as a form of capital. (The leading proponent of human capital theory, Theodore Schultz, began to publish this theory in economics journals in the early 1960's, see, e.g., Schultz, Investment in Human Capital, 51 Am. Econ. Rev. 1 (1961)). Moreover, the tax code has never treated the human body or health or other personal endow-

paid to restore, or compensate for a loss occasioned by personal injury, it is the sort of gain or accession of wealth that, in the judgment of Congress, should not be taxed.

A back pay recovery in a Title VII case squarely fits this rationale because it is intended to compensate, or make whole for the economic injury suffered through discrimination. *Albermarle Paper Co. v. Moody*, 422 U.S. at 418, 421 (citing legislative history of 1972 amendments to Title VII, 118 Cong. Rec. § 7168 (1972)). Despite acknowledging at some points in its brief that these Title VII awards are compensatory (Pet. Br. at 24, 27), at other points petitioner seems to retreat by calling a Title VII recovery one that merely represents an accession to wealth in the form of deferred wages (Pet. Br. at 20, 21). As previously demonstrated, this argument is tautological; in all personal injury cases in which a plaintiff recovers a monetary awards, there is, in economic terms, an accession to or enhancement of wealth.

Petitioner repetitively asserts, without any supportive analysis, that back wages cannot be viewed as compensation for lost capital. But the mere repetitive incantation of this point does not make it so. To the contrary, even a brief analysis of the restorative function of Title VII awards and the effect of discrimination on human capital

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ments as a form of capital with a tax basis, so that in one sense money received as compensation for an injury to these interests is always a realized accession to wealth. See *Roemer v. Commissioner*, 716 F.8d at 696 n.2; Stephen, Taxation and Human Capital, 70 Va. L. Rev. 1357, 1387-88 (1984).

It is most likely that the *Starrels* court simply used the word "capital" as a synonym for "money." Thus, the court was referring to personal injury awards that compensate for a loss of money occasioned by the injury, and was simply reiterating its emphasis on compensation for a loss of personal rights.

In this brief we will address both how Title VII awards fit this compensatory rationale, and also how discrimination impairs human capital and the ability to earn a fair return on one's capital.

makes it clear that a Title VII back pay award is *precisely* compensation for lost capital. A back pay award under Title VII serves the exact same purpose as the lost income damages received in any tort case. In essence it is compensation for income lost due to the wrongful act of discrimination. Income is one of the benefits derived from putting one's human capital to use. When income is lost through injury, the victim has suffered a loss of capital. Petitioner has made no efforts to distinguish the purpose of a Title VII recovery from the obviously excludable lost income recoveries flowing from other tort claims, nor can any such distinction be made. The lost income award in a Title VII case is just as much a restoration of lost capital as the lost income component of the award in any personal injury tort case.[14]

Personal, or human, capital is the sum total of attributes that a person has or acquires that make up her productive capacity of income-earning potential. One's body, health, strength and time are elements of human capital, as are intelligence, skill, education, training. See, e.g., Stephen, Federal Income Taxation and Human Capital, 70 Va. L. Rev. 1357, 1358-62 (1984). Diminutions of one's earning capacity, whether through physical injury, discrimination, or dropping out of the workforce or school, all constitute impairment of human capital. See, e.g., Posner, An Economic Analysis of Sex Discrimination Law, 56 U. Chi. L. Rev. 1311 (1989). It is widely recognized by economists that discrimination permanently reduces human capital because it undermines self-esteem and aspirations, and thus can reduce job

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[14] It is not necessary, as petitioner seems to imply at note 16 of its brief, for an impairment to be permanent or for the injury victim to have been rendered incapable of performing any work. Frequently, injuries will keep persons out of work temporarily, or reduce earning capacity, rather than rob it entirely. A reduction, even for a short time, of one's ability to earn the same return on human capital that one could have earned absent the wrongful conduct, is a loss of capital.

motivation and productivity. See Donohue, Prohibiting Sex Discrimination in the Workplace: An Economic Perspective, 56 U. Chi. L. Rev. 1337, 1348-49, 1353-54 (1989). The low self-esteem and sense of hopelessness about getting ahead that discrimination can engender also distort individual investments in human capital—if someone feels that her sex or race will still be a barrier to advancement or fair remuneration even if she gets additional training, she may forego the effort and expense of the investment in herself. *Id.* at 1357-58.

Discrimination fundamentally impairs human capital because it does not allow workers to advance as far as their capital attributes and investments would otherwise permit. Victims of employment discrimination are denied the opportunity to put their human capital to full use or to have their expenditures of human capital fairly evaluated and compensated, without regard to their race, gender, religion, or ethnicity. In this case the workers in the female-dominated job categories got a lower return on their human capital just because they did "women's work," while the mostly male workers in other job categories had the opportunity to get a fair return on their human capital uninfected by impermissible considerations of gender. The workers who were victimized by the discrimination therefore suffered a loss of capital. If their salary had been set based on their capital attributes rather than on their sex, they would have derived a greater return on their human capital. Consequently, if the case had gone to trial and they had received a back pay award, that award would have restored the fair return on capital of which they were wrongfully deprived.

For these reasons, petitioner is plainly wrong when it asserts that a back pay award represents salary for services rendered rather than a compensatory award designed to restore the capital lost through discrimination. Given their compensatory function, excluding Title VII recoveries from gross income for tax purposes fully comports with the purpose of § 104(a)(2).

Petitioner seeks to avoid this conclusion by arguing that unless their recoveries are taxed, discrimination victims will be better off than those who were not victimized by discrimination and kept working without interruption or diminution in salary. This argument, which was also adopted by the D.C. Circuit in *Sparrow*, has several flaws. First, it completely ignores § 104(a)(2). Second, its accuracy is suspect. Finally, it ignores the inherent adverse effects of discrimination, which are not remedied by recovery for only the economic loss.

Even on the doubtful assumption that injury victims really are better off than those who have not been injured simply because the victim does not have to pay taxes on the recovery, that is the judgment Congress has made by adopting § 104(a)(2). As several courts of appeals have pointed out, excluding recoveries in discrimination cases accords discrimination victims tax treatment *equal* to that of physical injury victims who have suffered lost income. The statute commands that all personal injury victims shall receive the same tax treatment. *Rickel*, 900 F.2d at 664; *Pistillo*, 912 F.2d at 150; *Burke*, 929 F.2d at 1123.

The government's "windfall" argument also overlooks the fact that a taxpayer who has to pay tax on a lump sum recovery in the year the recovery is received may well be worse off for tax purposes than persons who received money in incremental amounts spread out over a period of years. The lump sum recovery may well push the taxpayer into a higher tax bracket, and the taxpayer may well have fewer deductions to set off against the lump sum in the year it is received. In contrast, the taxpayer whose earnings were not diminished by discrimination or other injury may have remained in a lower tax bracket, thus paying less taxes in the long run than the victim who must pay at once the full tax on a lump sum recovery.[15] Moreover, the injury victim

[15] The "better off" argument is especially suspect here. The settlement amount was not based on a back pay calculation, no back

has been deprived of the use of the money for a long period of time, without interest, and thus may have lost investment or personal opportunities.

It is also erroneous to call a discrimination victim "better off" than someone who never suffered discrimination because there are long-lasting effects of discrimination that no amount of money can heal. The indignity, the stress, the anger, and the reduced self-esteem all remain with the wronged person. *Pistillo*, 912 F.2d at 150. As one sex discrimination victim eloquently explained to Congress during hearings on the Civil Rights Act of 1991, "compensatory and punitive damages will not give back to a plaintiff, in many cases, the career that they lost or the ability to rise further in that career. . . . It's a lasting damage. . . . Back pay . . . cannot compensate me for the emotional damage and career damage to [my] life's work." Testimony of Nancy Ezold, quoted at Hearings, *supra*, Part I, at 68-69. To call discrimination victims "better off" simply because, by operation of § 104(a)(2), they pay no taxes on their compensatory recovery, is to trivialize the seriousness and devastation of invidious discrimination. Excluding Title VII recoveries from taxation gives recognition to the full gravity of the harm of discrimination, and comports with Congress' recognition that discrimination is at least as reprehensible as "assaults, batteries, and other intentional injuries to people." *Id.* at 15.

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pay was in fact ever paid, and each person who received a distribution from the settlement proceeds very likely received far less than any actual wage loss that was suffered as a result of discrimination. For example, respondent Burke's gross recovery was $764.94 (petitioner's brief, p. 4) for a period covering almost six years, more exactly 69 months, amounting to $11.09 per month, or approximately 37 cents per day. Similar calculations may be made for respondents Carter and Gibbs.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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